85-490

No. .....

Supreme Court, U.S.
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CLERK

In The

# Supreme Court of the United States

October Term, 1985

MELBOURNE E. JOSEPH, SR., ET AL,

*Petitioners,*

v.

NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN, ET AL,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

I.

Did the United States Court of Appeals for the Fifth Circuit err in finding that individuals who accept a lump-sum retirement from an ERISA covered Pension Plan lack standing to assert ERISA violations affecting their pension benefits and reflecting a breach of duty committed by the Trustees?

II.

Did the United States Court of Appeals for the Fifth Circuit err in not compelling the Trustees of an ERISA covered Pension Plan to submit to arbitration when the trust regulations provided for arbitration in a pension dispute and when the Trustees of the Pension Plan affirmatively agreed to arbitrate?

## LIST OF ALL PARTIES TO THE PROCEEDING

PETITIONERS

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JAMES WILLIAM AYRES,
MAURICE PAUL BELLANGER,
WILMER BEN BENSION,
LESTER JOSEPH BOUDREAUX,
A. BROOKS,
W. CAIN,
SANTO F. CULOTTA,
C. CURRY,
BERNARD E CYRUS,
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RESPONDENTS

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NEW ORLEANS ELECTRICAL PENSION
AND RETIREMENT PLAN,
BERNARD RAYNAL,
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ANTHONY R. ZIEGLER

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*Petitioners,*

v.

NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN, ET AL,

*Respondents.*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners respectfully pray that a Writ of Certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit, entered March 8, 1985.

## OPINION BELOW

There is no district court opinion in this case. While the order of dismissal was entered on February 2, 1984, the district court orally rendered an opinion on February 1,

1984 which included conclusions of law. A copy of the Judgment of Dismissal and of the transcribed opinion are attached and are marked respectively as Appendix A and Appendix B.

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on March 8, 1985 and is reported at 754 F.2d 628 (5th Cir. 1985) and is attached as Appendix C.

The Petition for Rehearing and the Suggestion for En Banc Consideration were denied on April 22, 1985. A copy of the Order is attached as Appendix D.

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## JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on March 8, 1985; the Petition for Rehearing and the Suggestion for En Banc Consideration were denied on April 22, 1985. The Petition for a Writ of Certiorari was originally due on July 22, 1985. On July 19, 1985 the Petitioners obtained an order extending the time in which to file a Petition of Writ of Certiorari to and including August 20, 1985. On August 15, 1985 a second order was entered extending time in which to file a Petition for Writ of Certiorari to and including September 19, 1985.

Jurisdiction of this Court is invoked under Title 28, U.S.C. Section 1254(1) (1970).

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## *STATUTES INVOLVED

29 USC Section 1002(1) (1970)

29 USC Section 1132 (1970)

## STATEMENT OF THE CASE

This case presents a fundamental question concerning the ability of federal courts to accept jurisdiction of claims created by the Employee Retirement Income Security Act.

There are 49 named Petitioners in this action. Each Petitioner is a retired member of the New Orleans Electrical Pension and Retirement Plan. At various times prior to January 1, 1981 each of the Petitioners reached full retirement age and each chose to accept a lump-sum retirement benefit. According to the Trust document in effect at the times each Petitioner retired, a retiree received one dollar per month for each year of service performed prior to 1961 (past service credit), up to twenty years.

On July 29, 1981 the Respondents amended the Pension and Retirement Plan causing large increases in the value of a participant's past service credit. The July, 1981 amendment provided that, instead of receiving one dollar a month for each year of past service credit, a retiree would receive eight dollars per month for each year of past service credit.

Though the Respondents amended the Pension Plan in July, 1981, they made the decision to allow certain lump-

*Statutes involved are reproduced in Appendix E.

sum retirees to take advantage of the eight-fold increase in benefits. The Defendants made their July, 1981 amendment retroactive to January 1, 1981. Thus, the amendment was made to apply to lump-sum retirees who had retired seven months prior to the increase in benefits but not to apply to those who had retired seven months and one day prior to the increase in benefits. *See* Appendix F.

As soon as the lead Petitioner, Melbourne E. Joseph, Sr., learned of the increase in benefits, he applied for the additional retirement benefits but his application was rejected. The trust regulations state that "If . . . the claimant is dissatisfied with the Board's determination, he shall so notify the Board and the Board and the applicant . . . shall make a joint application . . . for . . . an impartial arbitrator . . . ." New Orleans Electrical Pension and Retirement Plan, May 1, 1974. The Trustees agreed to submit the Petitioner's claim to arbitration. *See* Appendix G. Though the parties had gone so far as to retain an arbitrator, the Respondents subsequently refused to submit to arbitration.

On or about May 11, 1983 the Petitioners filed a civil action in the United States District Court for the Eastern District of Louisiana invoking jurisdiction under the Employee Retirement Income Security Act, 29 U.S.C. Section 1132 (1970). On or about December 2, 1983 the Respondents filed a Motion to Dismiss alleging that the Petitioners lacked standing to sue since they had received lump-sum retirement benefits from the Pension Plan and therefore were not "participants."

The Petitioners opposed the Motion to Dismiss asserting that for purposes of invoking federal jurisdiction the Petitioners were indeed "participants" in that breach-

es of duty were alleged to have occurred prior to the Petitioners' retiring. The Petitioners further asserted that the Respondents admitted that the Petitioners are "participants" when the Respondents (1) allowed other lump-sum retirees to take advantage of the increase in benefits and (2) when the Respondents agreed to arbitrate the Petitioners' claim. The Petitioners also asserted that whether or not they had received all the benefits due them and whether or not they were entitled to further benefits were questions of fact to be determined by a trial on the merits.

The United States District Court for the Eastern District of Louisiana dismissed the Petitioners' complaint in its entirety concluding that "the statute clearly is not designed to cover prior lump-sum beneficiaries . . . ." *See* Appendix B.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the trial court's decision concluding that despite the language of ERISA, "[t]o be a 'participant,' a person must have either a present or a future right to benefits under the Pension or Retirement Plan" and that the Petitioners did not meet this requirement. *Joseph, et al v. New Orleans Electrical Pension and Retirement Plan,* 754 F.2d at 630.

While finding that the Petitioners lack standing under ERISA, the Fifth Circuit stated that the Petitioners might have had standing if the Complaint had been worded differently. *Id.* at 631.

On April 22, 1985 the Petition for Panel Rehearing and the Suggestion for En Banc Consideration were denied.

———o———

## REASONS FOR GRANTING THE WRIT

### I.

**Did the United States Court of Appeals for the Fifth Circuit err in finding that individuals who accept a lump-sum retirement from an ERISA covered Pension Plan lack standing to assert ERISA violations affecting their pension benefits and reflecting a breach of duty committed by the Trustees?**

Whether individuals who accept a lump-sum retirement from an ERISA covered Pension Plan have standing to assert violations of ERISA which affect their Pension benefits and reflect a breach of duty by the Trustees is a question which has not been settled but should be settled by this Court. Furthermore, the decision of the United States Court of Appeals for the Fifth Circuit in this cause is in conflict with decisions of other United States Courts of Appeal and with the Employee Retirement Income Security Act itself.

Title 29, U.S.C. Section 1132(a) (1) (1970) states that a civil action may be brought by a participant or beneficiary . . . ." Title 29, U.S.C. Section 1002(7) (1970) states that "The term 'participant' means any employee or former employee . . . , who is or may become eligible to receive a benefit of any type from an employee benefit plan."

The Fifth Circuit has determined in *Joseph, et. al. v. New Orleans Electrical Pension and Retirement Plan, et. al.* that regardless of the claim made, regardless of the facts alleged, a lump-sum retiree of an ERISA covered plan may never invoke federal jurisdiction by way of ERISA. The Fifth Circuit concluded that lump-sum retirees have "accepted the payment of everything due them

in a lump-sum" and that they have, per se, "received the full extent of their benefits and are no longer eligible to receive future payments." *Joseph,* 754 F.2d at 630. The Fifth Circuit ruled that "[t]o be a 'participant,' a person must have either a present or a future right to benefits under the Pension or Retirement Plan." *Id.* The Fifth Circuit did not reckon with the language of ERISA which states that a participant is one who "may become eligible to receive a benefit of any type . . . ." 29 U.S.C. Section 1002(7) (1970).

In 1981 the Fifth Circuit stated a position quite different from that stated in the case *sub judice.* In *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.,* 637 F.2d 357 (5th Cir. 1981), the Fifth Circuit was asked to determine whether or not employees who were terminated prior to the creation of the employee benefit plan were entitled to benefits. While holding that the Petitioners were not entitled to benefits, the Fifth Circuit found in favor of standing: "[A]t the time of this request their status was far from clear, and *we are not sure that those who may be entitled to benefits should be denied an opportunity to determine their entitlement.*" *Id.* at 362. (Emphasis added.)

One year prior to the *Paris* decision, the Fifth Circuit rendered another decision, which was completely ignored in *Paris,* concerning the standing requirements of ERISA. In *Nugent v. Jesuite High School of New Orleans,* 625 F.2d 1285 (5th Cir. 1980), a former employee whose pension benefits had not vested at the time she was terminated attempted to enforce certain provisions of ERISA. The Fifth Circuit posed the sole issue as "whether a former employee whose pension benefits were not vested at the

time of her termination retains 'participant' rights under the Act." *Id.* at 1286. In holding that she does not have standing, the Fifth Circuit stated that vested former employees and nonvested current employees have standing.

The United States Court of Appeals for the Ninth Circuit has addressed the standing question several times with varying results.

The facts of *Bricklayers' Health and Welfare Trust Fund v. Brick Masons' Health and Welfare Trust Fund,* 656 F.2d 1387 (9th Cir. 1981) are generally as follows: In 1960, the Brick Masons' Fund was established by four local unions. In 1970, the plan was amended to require that any group "who ceased to be a party to this Agreement shall forfeit any and all rights and interests in the Fund." *Id.* at 1389. In 1979, the plan split into the Bricklayers' and the Brick Masons' Funds. The Bricklayers Fund attempted to negotiate recovery of what it considered to be its pro-rata share of the original plan funds. Based on the forfeiture provision quoted above, the negotiations failed. The Bricklayers filed suit alleging jurisdiction under ERISA.

The Ninth Circuit held that *"former participants are entitled to sue under Section 1132 . . . ." Id.* at 1390. (Emphasis added.) In referring to ERISA's definition of a "participant," the Ninth Circuit determined that a "participant" for jurisdictional purposes is quite different than that for other ERISA purposes. Because the "former participants allege that they are entitled to receive certain benefits from the Brick Masons' Fund [,] they are therefore participants for jurisdictional purposes." *Id.* at 1391.

Subsequent to the *Bricklayers'* case, the Ninth Circuit rendered another opinion without any reference to *Bricklayers'*. In *Freemen v. Jacques Orthopedic and Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654 (9th Cir. 1983) the plaintiff sought damages on the theory that he was misled as to the cost of participating in the plan and that his waiver of his right to participate in the plan was induced by the defendant's misrepresentation. The Ninth Circuit held that *Freemen* was not a participant because, "[n]o contributions were made into the defendant-plan on his behalf. Nothing Freemen can do will make him eligible for benefits since he is no longer employed by the defendant." *Id.* at 655. After this holding the Ninth Circuit went on to address the fact that Freeman's claim arose prior to ERISA's enactment.

In *Weiss v. Sheetmetal Worker's Local Number 544 Pension Trust*, 719 F.2d 302 (9th Cir. 1983) the Ninth Circuit specifically rejected the Fifth Circuit's decision in *Nugent v. Jesuite High School*, 625 F.2d 1285 (5th Cir. 1980). The Ninth Circuit left open the "question whether a former employee may qualify as a 'participant' by making a showing that he 'may become eligible' because there is a significant probability he may . . . satisfy vesting requirements in the future." *Id.* at 304. The Ninth Circuit made a decision, limited to the *Weiss* case, that *Weiss* was not a "participant" "because he is a former employee who has made no credible showing that he is vested and because he does not claim that he will return to work." *Id.* Obviously, the Ninth Circuit's decision does nothing for a case like that *sub judice* which involves certain members of the Petitioners' class receiving additional benefits while others do not.

The Ninth Circuit recently rendered another decision which amounts to another single-case analysis. In *Chase v. Trustees of the Western Conference of Teamsters Pension Trust Fund,* 753 F.2d 744 (9th Cir. 1985), without conclusively addressing standing, the Ninth Circuit found that the

> contributions which the [appellants] seek to recover in this case were . . . made while they were thought to be 'participants.' This suit is one for equitable relief to redress what is now seen to have been a violation of the plan.

*Id.* at 748.

Further conflict in the law on standing under ERISA is created by decisions from the Second and Third Circuits. In *Saladino v. I.L.G.W.U. National Retirement Fund,* 754 F. 2d 473 (2nd Cir. 1985) the Second Circuit decided that "participant is limited to either employees in, or reasonably expected to be in, currently covered employment or *former employees with a colorable claim to vested benefits.*" *Id.* at 476. (Emphasis added.)

In *Buczynski v. General Motors Corp.,* 616 F.2d 1238 (3rd Cir. 1980), a class action was brought by retirees, former employees, who were receiving monthly benefits. Standing as to the appellants was assumed since the appellants were still receiving benefits. The Third Circuit did not address the fact that the value of lump-sum retirement and monthly retirement is to be actuarially alike.

In *Barrowclough v. Kidder, Peabody and Co., Inc.,* 752 F.2d 923 (3rd Cir. 1985) the Third Circuit found, with-

out a specific ruling, that a former employee with non-vested benefits had standing under ERISA to demand an accounting: "If the right to an accounting were dependent on the ultimate outcome of any dispute . . . the statutory provision regarding an accounting would be rendered nugatory." *Id.* at 933.

Indeed, the conflict between and within the circuits has left district courts essentially helpless in maintaining consistency within a circuit. *Stewart v. National Shopmen Pension Fund, et al,* 563 F.Supp. 773 (D.D.C. 1983) (Former employees receiving monthly retirement benefits are participants); *Folz v. Marriot Corp.,* 594 F. Supp. 1007 (W.D.Mo. 1984) (Former employee who was a participant at the time of his termination possesses standing under ERISA to "recover benefits due him . . . , to enforce his rights . . . , or to clarify his rights to future benefits . . . ." *Id.* at 1013); *Yancy v. American Petrofina, Inc.,* 597 F. Supp. 491 (E.D.Tex. 1984) (Former employee who accepted a lump-sum retirement benefit lacked standing under ERISA for breach of duty arising while he was an employee).

As can be seen from the appellate court and trial court decisions cited, there is no continuity in the methods used to determine standing under ERISA. There is conflict between and within the circuits. The issue is one of great importance to the uniform enforcement of ERISA and should be settled by this Court.

## II.

**Did the United States Court of Appeals for the Fifth Circuit err in not compelling the Trustees of an ERISA covered Pension Plan to submit to arbitration when the trust regulations provided for arbitration in a pension dispute and when the Trustees of the Pension Plan affirmatively agreed to arbitrate?**

An issue which has been cycloned into the first issue presented to this Court is whether or not the Respondents should have been compelled to arbitrate, not withstanding the "participant" question, when they had agreed to arbitrate. The lower courts, in determining that the Petitioners are not "participants" for standing under ERISA, determined that the Petitioners are not entitled to compel arbitration. The question really becomes whether it is the province of the district court to determine the jurisdiction of an arbitrator or if such determination should be left to the arbitrator. This Court has addressed this issue numerous times. The decision of the Fifth Circuit and of the United States District Court for the Eastern District of Louisiana are in conflict with prior decisions of this Court.

As evidenced by the letters contained in Appendix G, from the outset of the controversy the Respondents agreed to arbitrate the Petitioners' claim; whether the Petitioners were "participants" under the Pension Plan was never raised by the Respondents. Then, without expressed reason, the Respondents withdrew the commitment to arbitrate.

It is well settled that the merits of an arbitration grievance must be left to the arbitrator and not to the federal courts:

> The Court must compel Arbitration with the party seeking same and making a claim which on its face is governed by the contract, even though the court might feel that the grievance is frivolous or baseless.

Ekouri, *How Arbitration Works* 3rd ed., at 29-30 (1976).

In *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, 363 U.S. 574 (1960), in an opinion written by Justice Douglas and announced by Justice Brennen, this Court held that

> [t]he Judiciary sits in these cases to bring into operation an arbitral process which substitutes a regime of peaceful settlement for the older regime of industrial conflict. Whether contracting out in the the present case violated the agreement is the question. *It is a question for the arbiter, not for the courts.*

*Id.* at 585. (Emphasis added.)

In a decision handed down the same day as *United Steelworkers of America v. Warrior and Gulf Navigation Co.*, this Court found that the "federal policy of settling major disputes by arbitration would be undermined if courts had the final say on the merits of the awards." *United Steelworkers of America v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960). This Court stated further that "[w]hen an arbitrator is commissioned to interpret and apply the collective bargaining agreement, he is to bring his informed judgment to bear in order to reach a fair solution of a problem." *Id.*

Finally, in *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960) this Court removed all doubt concerning the role of federal courts in arbitrable causes:

> The courts . . . have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious.
>
> . . . .
>
> When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entitled to the arbitration tribunal.

*Id.* at 568-569.

When the trial court dismissed the Petitioners complaint, and when the Fifth Circuit affirmed, the courts essentially determined the merits of a claim which the Petitioners were ready, willing and entitled to arbitrate. This decision of the lower courts is in direct conflict with prior decisions of this Court.

## CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Dated the 19 day of September, 1985.

Respectfully submitted,

/s/ JAYNE L. BUTTROSS
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**APPENDIX "A"**

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

CIVIL ACTION NO. 83-2553

MELBOURNE E. JOSEPH, SR., ET AL

VERSUS

THE NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN, ET AL
SECTION "K" (5)

JUDGEMENT

(Filed February 13, 1984)

The Court having previously granted the defendants', The New Orleans Electrical Pension and Retirement Plan, Anthony R. Ziegler, Bernard C. Frischhertz, Jr., Robert L. Appel, A. Bostick, Bernard Raynal and Richard E. Schrieffer, Sr., motion to dismiss;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of defendants, The New Orleans Electrical Pension and Retirement Plan, Anthony R. Ziegler, Bernard C. Frischhertz, Jr., Robert L. Appel, A. Bostick, Bernard Raynal and Richard E. Schrieffer, Sr., and against plaintiffs, Melbourne E. Joseph, Sr., Francis Fenasci, D. Adorno, III, James William Ayres, Maurice Paul Bellanger, Wilmer Ben Benison, Lester Joseph Boudreaux, Santo F. Culotta, C. Curry, Bernard E. Cyrus, Bennie Joseph D'Arcangelo, S. D'Arcangelo, Anthony DiPascal, James C. Dyer, Edward Emile Fenasci, F. X. Fenasci, Floyd Michael Johnson, M. E. Joseph, Sr., Louis George Kahl, Edward Lacoste, Rene

Lacoste, August Joseph Lucas, Joseph C. Miller, Jr., Ursin Frank Monier, Joseph Muller, Clyde A. Munch, Victor James Munch, Sr., Frank J. Nicosia, Andrew Bryan Norton, Jacob Earl Plick, Walter F. Ramirez, Jules Lou Schaff, Ferdinand John Schwab, Joseph George Schwartz, Warren L. Seher, Joseph Charles Skinner, William J. Stowell, Alfren Tschirn, Emile J. Wolf, Charles Loyola Wolsch, Charles Zerinque, Jr., L. H. Zirkenback, W. Cain, Eugene James Des Roches, dismissing said plaintiffs' complaint.

New Orleans, Louisiana, this 1st day of February, 1984.

/s/ William Arceneaux
UNITED STATES DISTRICT
JUDGE

## APPENDIX "B"

Oral Conclusions Of Law, United States District Court, The Eastern District Of Louisiana, February 1, 1984

* * *

(p. 21) "I'm going to grant the motion to dismiss. I think the statute clearly is not designed to cover prior lump-sum beneficiaries, persons who have opted for a lump-sum distribution, particularly when I'm looking at a plaintiff, a lead plaintiff who goes back to 1977, almost five years before the effective date of the amendment, and in excess of four years prior to the retroactive date of the amendment. The best that you can come up with is someone who lump-summed out in the late summer, August or thereabouts, of 1980, (p. 22) which is some five or six months prior to the retroactive date, and almost a year prior to the amendment to the effective date. The Court also notes that the record clearly reflects that the amendment was predicated upon an effective May 1, 1981 increase in contributions by the participating employers to the plan.

"Now, it may be that the 1981 retroactivity feature was improper, but that by itself would not create standing on these persons who are joined as parties plaintiff to this suit. I think that that's precisely the kind of circumstance that the Fifth Circuit had in mind in Nugent. Now, I have read the Ninth Circuit case, the bricklayers and brickmasons case but I think there what you had is an entirely different situation, the Court sitting in effect as a Court in equity, and here was a breakaway group who elected to opt out of one pension plan and form their own. They remained employees in the pension plan from which they withdrew or — when I say withdrew, their new fund, or their new plan withdrew — had accumulated monies, a surplus that was generated by contributions previously made on behalf of those employees. And those employees, it was

noted by the Court, did not withdraw. There was simply a new organism formed, and they found that that new organism was entitled to the reserve fund which had been generated by virtue of contributions previously made on behalf of these employees.

(p. 23) "We haven't got that situation here. The Fifth Circuit says, We believe that the "may become eligible" language was intended only to apply to current employees. And insofar as receiving benefits are concerned, these employees were not vested at the time that they received their lump-sum distribution, but they have lump-summed out, they have cashed out. They have elected to take their lump-sum distribution in lieu of remaining in under a defined benefit plan, receiving periodic pension payments.

Now, if they were still receiving pension payments, there is no doubt that they would be, in my opinion, a participant, but they are not. They made the election to cash out at the time they respectively made these elections, and if we're going to permit former employees who cash out to come in some almost five years later to contest the efficacy of what was done by administrators of a plan, and trustees of a trust, then you just might as well write out the entire standing issue from ERISA, and substitute in its place some variety of statute of limitations. Congress has not seen fit to do that. So this Court feels that these plaintiffs, none of them, but particularly the lead plaintiff, Mr. Joseph, do not fit the mold, or fit the statutory concept of participants, and, therefore, they have no standing. The motion to dismiss will be granted."

## APPENDIX "C"

Melbourne E. JOSEPH, Sr., et al.,

Plaintiffs-appellants,

v.

The NEW ORLEANS ELECTRICAL PENSION & RETIREMENT PLAN, Individually and Its Trustees, et al., Defendants-appellees.

No. 84-3170.

United States Court of Appeals, Fifth Circuit.

March 8, 1985.

Rehearing and Rehearing En Banc Denied April 22, 1985.

Retirees sought to invoke Employee Retirement Income Security Act to obtain federal jurisdiction over their claim that trustees of retirement plan breached duties owed to them under Act. The United States District Court for the Eastern District of Louisiana, George Arceneaux, Jr., J., dismissed complaint, and appeal was taken. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that retirees who had chosen to receive lump-sum retirement benefits in lieu of a continuing monthly benefit that might have yielded a smaller total sum were not "participants" within meaning of ERISA, and thus they lacked standing to assert that claim.

Affirmed.

1. Master and Servant—78.1(8)

Under Employee Retirement Income Security Act, a "participant," for standing purposes, is any employee

or former employee or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 3(7), 29 U.S.C.A. §§ 1001 et seq., 1002(7).

See publication Words and Phrases for other judicial constructions and definitions.

2. Master and Servant —78.1(8)

To be a "participant," for standing purposes under Employee Retirement Income Security Act, a person must have either a present or a future right to benefits under pension or retirement plan, thereby excluding retirees who have accepted payment of everything due them in a lump-sum, because those erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 3(7), 29 U.S.C.A. §§ 1001 et seq., 1002(7).

3. Master and Servant —78.1(8)

Retirees who had chosen to receive lump-sum retirement benefit in lieu of a continuing monthly benefit that might have yielded a smaller total sum were not "participants" within meaning of the Employee Retirement Income Security Act, and thus they lacked standing to assert claim that trustees of retirement plan breached duties owed to them under Act. Employee Retirement Income Security Act of 1974, §§ 2 et seq., 3(7), 29 U.S.C.A. §§ 1001, et seq., 1002(7).

4. Statutes —219(1)

Interpretation of a statute by agency charged with its administration is entitled to substantial deference.

---

Melbourne E. Joseph, Jr., Gulfport, Miss., Diana T. Berman, Arabi, La., James K. Wetzel, Jayne L. Buttross, Gulfport, Miss., for plaintiffs-appellants.

Hess & Washofsky, Dennis M. Angelico, New Orleans, La., Carolyn P. Perry, Baton Rouge, La., for defendants-appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, RUBIN and HILL, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Retired members of the New Orleans Electrical Pension and Retirement Plan invoke the Employee Retirement Income Security Act to obtain federal jurisdiction over their claim that the Trustees of the Plan breached duties owed to them under the Act. Because the district court correctly dismissed the complaint on the ground that plaintiffs, after retirement, were not "participants" within the meaning of the Act, and, therefore, lacked standing to assert their claims, we affirm.

At various times prior to January 1, 1981, each of the plaintiffs reached retirement age and each chose to receive a lump-sum retirement benefit in lieu of a continuing monthly benefit that might have yielded a smaller total sum. The decision to accept the lump-sum retirement bene-

fit was based on the amount of benefits provided retirees by the Plan as it then read.

The Trustees later, in July, 1981, amended the Plan, and voted large increases in the value of a participant's past service credit. The amendment provided that, instead of receiving $1.00 per month for each year of past service credit, a retiree would receive $8.00 per month for each year of past service credit. The complaint alleges, "the above increases were made possible because of an additional .10¢ (sic) per hour on May 1, 1981, as well as an increase in income from investments, in accord with the policy and minutes of the" Plan.

Although the amendment was adopted in July, the Trustees decided to allow certain lump-sum retirees to take advantage of the eight-fold increase in benefits, so they made the amendment retroactive to January 1, 1981. The amendment was thus made applicable to lump-sum retirees who had retired seven months before the increase in benefits, but not to persons who had retired more than seven months before the increase in benefits even if their retirement occurred only one day earlier.

[1] Under ERISA, a "participant," for standing purposes, is "any employee or former employee . . . or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan. . . ."[1] The retirees argue that they are clearly "former employees"—as indeed they are—and that they are or "may become eligible to receive a benefit" from the defendant Pension and Retirement Plan.

---

1. 29 U.S.C. § 1002(7).

[2-4] We cannot adopt the construction of the Act sought by the pre-1981 retirees. To be a "participant," a person must have either a present or a future right to benefits under the pension or retirement plan. This excludes retirees who have accepted the payment of everything due them in a lump sum, because these erstwhile participants have already received the full extent of their benefits and are no longer eligible to receive future payments. Such retirees have no present or future right to Plan funds, and the Plan no longer has any obligations to these individuals. This is consistent with prior Fifth Circuit decisions limiting the "may-become-eligible" phrase to current employees, and to former employees with currently vested benefits,[2] as well as with Department of Labor regulations pertaining to the administration of ERISA.[3] Those regulations specifically exclude from the definition of "participant" "an individual to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan."[4] The interpretation of a statute by the agency charged with its administration is entitled to substantial deference.[5]

It might be argued that, in voting to increase the benefits for past participants, the Trustees violated their duty

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2. *Jackson v. Sears, Roebuck & Co.*, 648 F.2d 225, 228-29 (5th Cir.1981); *Nugent v. Jesuit High School*, 625 F.2d 1285, 1287 (5th Cir.1980).

3. 29 C.F.R. § 2610.2 (1984).

4. *Id.* paragraph (b).

5. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, — U.S. —, — - —, 104 S.Ct. 2778, 2782-83, 81 L.Ed.2d 694, 703-04 (1984); *see United States Department of Justice v. Federal Labor Relations Authority*, 727 F.2d 481, 486 (5th Cir.1984).

to those persons who were continuing participants, by diverting funds that should have been used only for the benefit of participants as defined by the Act. We express no opinion on that question. Nor do we speak to whether lump-sum retirees might state a claim for relief under ERISA on either the contractual basis that a plan prohibits unequal retroactive distribution of benefits or the statutory basis that trustees are not to discriminate within classes of participants or beneficiaries. It was also suggested at oral argument that the Trustees might have accumulated funds before January, 1981 to such an extent that they should have increased benefits before the plaintiffs retired. Although perhaps intimated in the complaint, that issue was not raised in the district court and was not raised in the brief on appeal. We, therefore, do not address it.[6]

For these reasons, the judgment of dismissal is AFFIRMED.

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6. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 488 fn. 7 (5th Cir.1984); *see First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-90, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569 (1968).

**APPENDIX "D"**

FOR THE FIFTH CIRCUIT

No. 84 3170

MELBOURNE E. JOSEPH, SR., ET AL.,

Plaintiffs-Appellants,

versus

THE NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN, individually and its trustees, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion March 8, 5 Cir., 1985, — F.2d —)

(April 22, 1985)

Before GOLDBERG, RUBIN and HILL, Circuit Judges.
PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor

of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Alvin B. Rubin
United States Circuit Judge

Clerk's Note: See Frap and Local Rules 41 for Stay of the Mandate.

REHG-6

## APPENDIX "E"

29 USC § 1002 LABOR

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is, or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

§ 1132. Civil enforcement

Persons empowered to bring civil action

(a) A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

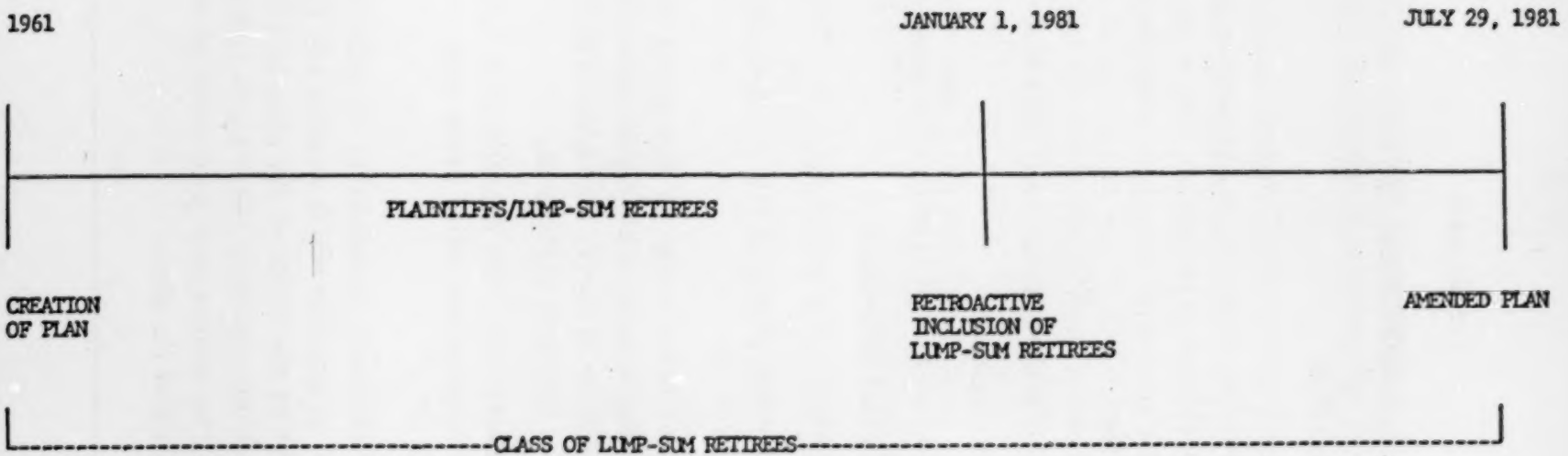
(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

# APPENDIX "F"

Exhibit "A"



**APPENDIX "G"**

HESS & WASHOFSKY
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Attorneys At Law
1411 Decatur Street
New Orleans, Louisiana 70116

Victor H. Hess, Jr.
Leonard A. Washofsky
Dennis M. Angelico
Keith R. Credo

Telephone
(504) 949-2742

December 15, 1981

Mr. Melbourne E. Joseph, Jr.
Joseph & Smith, P.A.
Attorneys at Law
P. O. Box 1262
627 Hardy Avenue, Suite C
Gulfport, Mississippi 39501

RE: Pension Benefits
Our File: 1319

Dear Mel:

We are in receipt of your letter of December 4, 1981 with regard to your father's claim for additional retirement benefits. I will present the letter to the trustees and advise with them. Thereafter, I will be back in touch with you.

Sincerely,
/s/ Dennis
Dennis M. Angelico

DMA/cll

HESS & WASHOFSKY
A Professional Corporation
Attorneys At Law
1411 Decatur Street
New Orleans, Louisiana 70116

Victor H. Hess, Jr.
Leonard A. Washofsky
Dennis M. Angelico
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Telephone
(504) 949-2742

April 8, 1982

Mr. Melbourne E. Joseph, Jr.
Joseph & Smith, P.A.
Attorneys at Law
P. O. Box 1262
627 Hardy Avenue
Suite C
Gulfport, Mississippi 39501

RE: Claim of Melbourne E. Joseph, Sr.
for increased pension benefits

Dear Mel:

I have reviewed the matters set forth in your letters of December 4, 1981 and February 9, 1982. In those letters, you set forth the claim of your father, Melbourne E. Joseph, Sr., for increased pension benefits and for the Trust Fund to provide certain information.

It is my understanding that your father retired and elected the optional lump sum form of benefit payments. His retirement was long prior to the Board of Trustees' action in mid-1981 wherein there were certain pension and retirement benefit improvements. The level of improvements in the benefit rates was made based upon advice from the Plan actuary. The increased benefit rate became effective January 1, 1982, and it applied to those indi-

viduals who were retired but did not take the optional lump sum form of benefit payments, i.e., to those who were receiving a monthly pension benefit. The increased benefit levels did not apply to those individuals who retired prior to January 1, 1981 and who opted for the lump sum payment.

As I understand your father's claim, he believes that he should have his lump sum benefit recalculated to reflect the increased benefit rates. In connection with his claim, he has requested that the Board of Trustees furnish him with the names of Plan participants who opted for lump sum benefits when those individuals retired.

I have reviewed the claim of your father, Melbourne E. Joseph, Sr., and I have researched the matter thoroughly. I am of the opinion that the action which the Board of Trustees took in the mid-part of 1981 with regard to increasing benefit levels, and without affording those increases to all individuals who retired prior to January 1, 1982 and who opted for the lump sum benefits, was not only legal, but was based upon actuarial advice in order that the Plan remain actuarilly sound. It is my opinion that the Trustees of Plans such as the New Orleans Electrical Pension and Retirement Plan, have no duty to increase benefits of pensioners after they have retired. Courts consistently recognize that a pensioner's rights vest at the time of retirement and that these rights constitute the full measure of any member's entitlement.

The Trustees of the New Orleans Electrical Pension Plan have full authority to determine all questions of the nature, amount of and duration of benefits to be provided based upon what it is estimated the Trust Fund can pro-

vide without undue depletion or excessive accumulation. The Board of Trustees has done exactly that in this instance. We submit that there is nothing about the action of the Trustees which is unjustified, illegal, arbitrary, capricious or discriminatory. If your father, Melbourne E. Joseph, Sr., is still of the opinion that the action of the Trustees was incorrect in any manner, then he has a right to appear before the Board of Trustees, along with a legal representative, to present his claim. If your father is desirous of doing so, the Trustees and I would appreciate any legal authorities of which you may be aware to support your father's claim.

Very truly yours,
/s/ Dennis M. Angelico

DMA/c11
cc: Board of Trustees,
New Orleans Electrical Pension
and Retirement Plan

Mrs. Louise Brown

---

HESS & WASHOFSKY

A Professional Corporation
Attorneys At Law
1411 Decatur Street
New Orleans, Louisiana 70116

Victor H. Hess, Jr.
Leonard A. Washofsky
Dennis M. Angelico

Keith R. Credo

Telephone
(504) 949-2472

August 5, 1982

Mr. Melbourne E. Joseph, Jr.
627 Hardy Ave., Suite C
P. O. Box 1262
Gulfport, MS 39501

RE: New Orleans Electrical Pension
and Retirement Plan
Our File No. 1319

Dear Mel:

First, let me apologize for not responding to your letter of June 10, 1982. However, my schedule has been extremely hectic this summer.

In your letter of June 10, you requested:

1) A copy of the names of the lump-sum retirees,

2) A copy of the Plan as presently implemented, and

3) The Appeals Procedure.

You indicated this information was requested pursuant to 29-USC, Section 1132.

....

Employee Retirement Income Security Act (ERISA) does require that we furnish you with a copy of the Plan as presently implemented, therefore, we enclose a copy of the Plan herewith which is presently in effect and which was executed on September 14, 1977.

The Appeals Procedure is as follows:

Any participant who is aggrieved by action of the Trustees under this Plan, or who is otherwise adversely affected by any action of the Trustees, shall have the right to request the Board of Trustees to conduct a hearing on the matter, provided that he makes such a request in writing, within sixty (60) days after being appraised of, or learning of, the Board's action. The Board shall then conduct a hearing, at which the participant shall be entitled to present his position and any evidence in support thereof. The participant may be represented at any such hearing by an attorney or by any other representative of his choos-

ing. Thereafter, the Trustees shall issue a written decision reaffirming, modifying or setting aside their former action. If the participant is dissatisfied with the written decision of the Trustees, he shall have the right to appeal the matter to arbitration in accordance with the labor arbitration rules of the American Arbitration Association, provided that he submitted a request for arbitration to the Board of Trustees, in writing within sixty (60) days of receipt of the written decision. The fees of the arbitrator and of the American Arbitration Association shall be borne equally by the appealing party, and by the Trust Fund, and the arbitrator's fee and expenses shall also be borne equally, unless the arbitrator, in his award, should assess such expenses against either of the parties. The decision of the arbitrator shall be final and binding upon the Trustees and upon the appealing party.

Of course, the Board had a hearing at the request of your father, Melbourne E. Joseph, Sr. The Board will issue a written decision sometime in the near future. Should your father not be satisfied with the Board's decision, he has the right to take the matter to final and binding arbitration.

We trust that this will answer your request of June 10, 1982.

Kindest regards,

Sincerely,
/s/ Dennis M. Angelico

---

HESS & WASHOFSKY
A Professional Corporation
Attorneys At Law
1411 Decatur Street
New Orleans, Louisiana 70116

Victor H. Hess, Jr.
Leonard A. Washofsky
Dennis M. Angelico
Keith R. Credo

Telephone
(504) 949-2742

November 23, 1982

Mr. Melbourne E. Joseph, Jr.
Joseph, Pritchard, Smith & Associates
Attorneys at Law
384 Courthouse Road
P. O. Box 1262
Gulfport, MS 39501

RE: Joseph, et al vs New Orleans
Electrical Pension and Retirement

Dear Mel:

By letters dated December 4, 1981 and February 9, 1982, you made claim against the New Orleans Electrical Pension and Retirement Plan on behalf of your father and client, Melbourne E. Joseph, Sr. The claim was for increased pension benefits. You also requested the Plan to provide you with certain information. On April 8, 1982, I responded to your letters of December 4, 1981 and February 9, 1982 and set forth our opinion that your father was not entitled to any increases in benefits. In our letter of April 8, 1982, we indicated that if your father still felt that the action of the Board of Trustees in not increasing his benefits was incorrect, then he had the right to appear before the Board of Trustees, along with a legal representative, to present his claim. You subsequently indicated that that was the desire of your father.

On June 9, 1982, you and your father appeared before the Board of Trustees and were allowed to present any evidence or materials and argument with regard to your father's claim that he was due an increase in benefits. The Board took the matter under advisement. Subsequent to the hearing, by letter dated July 10, 1982, you requested certain information. We responded to your request on August 5, 1982.

The Board of Trustees has asked me to issue a written decision on your father's claim.

After having reviewed the claim of your father, and based upon advice from me, the Board of Trustees must once again deny your father's claim for increased benefits.

In Mid-1981, the Board of Trustees for the Pension Plan made certain pension and retirement benefit improvements. The increased levels did not apply to any individual who retired prior to January 1, 1981 and who had, at the time of his retirement, opted for the lump sum benefit. Those individuals who did retire prior to January 1, 1981 but who took the monthly benefit under the provisions of the Pension Plan, did receive an increase in their monthly benefit payment. As stated above, the Board of Trustees made these benefit improvements based upon advice from the Plan actuary and consultant.

As the Board understands your father's claim, he believes that he should have his lump sum recalculated to reflect the increased benefit. The Board of Trustees is of the opinion that the action which it took in the mid-part of 1981 with regard to increasing benefit levels and without affording those benefits to all individuals who retired before 1981 and who opted for lump sum benefits was not

only legal, but was based upon actuarial advice in order that the Pension Plan would remain actuarilly sound.

The Trustees of the New Orleans Electrical Pension and Retirement Plan have full authority to determine all questions of the nature, amount of and duration of benefits to be provided based upon what is estimated the Trust Fund can provide without undue depletion or excessive accumulation. The Board of Trustees has done exactly that in this instance. There is nothing about the action of the Trustees which is unjustified, illegal, arbitrary, capricious or discriminatory.

As we previously indicated to you, if your father is dissatisfied with the decision of the Trustees, he has the right to appeal the matter to arbitration in accordance with the Labor Arbitration Rules of the American Arbitration Association provided he submits a request for arbitration to the Board of Trustees in writing within 60 days of the receipt of the written decision.

Kindest regards,

Sincerely,
/s/ Dennis M. Angelico

DMA/c11
encl.

Supreme Court, U.S.
FILED
NOV 3 1986
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 85-490

In The

# Supreme Court of the United States

October Term, 1985

MELBOURNE E. JOSEPH, SR., ET AL,
*Petitioners,*

v.

NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN, ET AL,
*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

I.

Do former members of a pension plan who elected to receive lump sum benefits in lieu of monthly benefits on retirement continue to be "participants" within the intendment of 29 USC 1002(7) and 1132?

II.

Does a substantial and material dispute exist among the Circuit Courts of Appeal sufficient to require this Court to accept certiorari in the present matter?

III.

Have plaintiffs waived their right to request that defendants be compelled to submit to arbitration by invoking the jurisdiction of the federal court, requesting relief on the merits, and failing to request that defendants be compelled to arbitrate in any of the previous proceedings?

## LIST OF ALL PARTIES TO THE PROCEEDING

Petitioners

D. Adorno, III,
James William Ayres,
Maurice Paul Bellanger,
Wilmer Ben Bension,
Lester Joseph Boudreaux,
A. Brooks,
W. Cain,
Santo F. Culotta,
C. Curry,
Bernard E. Cyrus,
Bennie Joseph D'Arcangelo,
Joseph Anthoney D'Arcangelo,
S. D'Arcangelo,
C. Desporte,
Eugene James Des Roches,
Anthony Di Pascal,
James C. Dyer,
Edward Emile Fenasci,
F. X. Fenasci,
H. Incardona,
Floyd Michael Johnson,
M. E. Joseph, Sr.,
Louis George Kahl,
P. O. Koine,
Edward Lacoste,
Rene Lacoste,
August Joseph Lucas,
L. C. Meyn,
Joseph C. Miller, Jr.,
Ursin Frank Monier,
Joseph Muller,
Clyde A. Munch,
Victor James Munch, Sr.,
Frank J. Nicosia,
Andrew Bryan Norton,
Jacob Earl Plick,

Walter F. Ramirez,
A. Romano,
Jules Lou Schaff,
Ferdinand John Schwab,
Joseph George Schwartz,
Warren L. Seher,
Joseph Charles Skinner,
William J. Stowell,
Alfred Tschirn,
Emile J. Wolf,
Charles Loyola Wolsch,
Charles Zerinque, Jr.,
L. H. Zirkenback.

Respondents

Robert L. Appel,
A. Bostick,
Bernard Frischhertz, Jr.,
New Orleans Electrical Pension
and Retirement Plan,
Bernard Raynal,
Richard E. Schrieffer, Sr.,
Anthony R. Ziegler.

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No. 85-490

In The

# Supreme Court of the United States

October Term, 1985

MELBOURNE E. JOSEPH, SR., ET AL,

*Petitioners,*

v.

NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN, ET AL,

*Respondents.*

## BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

### STATUTES INVOLVED

29 USC 1002(7)

29 USC 1132

29 USC 1002(22)

29 USC 1002(23)

29 CFR 2610.2

## STATEMENT OF THE CASE

As stated by applicants, the only significant issue presented concerns the threshold determination of federal court subject matter jurisdiction under the Employees Retirement Income Security Act, 29 USC 1001, et seq. The particular question involves whether plaintiffs qualify as "participants" as defined by 29 USC 1002(7), (Appendix A). Under ERISA, status as a "participant" is determinative of both subject matter jurisdiction and standing. 29 USC 1132 (Appendix B).

The plaintiffs in the present matter are retired members of the New Orleans Electrical Pension and Retirement Plan. Each plaintiff voluntarily elected to accept a lump sum retirement benefit in lieu of continuing monthly benefits at some time before January 1, 1981. In fact, the lead plaintiff, Mr. Melbourne Joseph, retired approximately five years prior to that date.

The basis for applicants' present complaint is an amendment to the Plan which increased the benefits payable to members retiring on or after January 1, 1981. The Plan was amended July 29, 1981, but the increase in benefits was made retroactive to January 1, 1981. Those members accepting a lump sum retirement benefit between January 1, 1981 and July 29, 1981 were extended the increased benefits under the Plan amendment.

Contending that the defendants had breached duties owed to them under ERISA, the plaintiffs filed this action in the United States District Court for the Eastern District of Louisiana. The sole basis for subject matter jurisdiction was predicated upon 29 USC 1132 which provides a federal forum for a participant's civil action to

recover benefits due him under the Plan, to enforce his rights under the terms of the Plan, or to clarify his rights to benefits.

Defendants answered the petition and filed a motion to dismiss the complaint contending that as a matter of law the federal court lacked subject matter jurisdiction, the plaintiffs lacked standing and the petition failed to state a cause of action upon which relief could be granted. The basis for this motion was defendants' contention that plaintiffs did not qualify as "participants" under 29 USC 1002(7), and 1132.

Briefs were filed on behalf of both plaintiffs and defendants, and oral arguments were presented to the District Court on February 1, 1984. At that time, the court granted defendants' motion to dismiss and assigned oral reasons.

Plaintiffs perfected an appeal to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit concluded that the plaintiffs were not "participants" and affirmed the trial court's decision. *Joseph, et al v. New Orleans Electrical Pension and Retirement Plan,* 754 F.2d 628 (5th Cir. 1985).

Plaintiffs subsequently filed a petition for a panel rehearing and en banc consideration. This request was denied by the Fifth Circuit on April 22, 1985. Plaintiffs have now applied for a writ of certiorari. Defendants contend that certiorari is not necessary in the present case and oppose plaintiffs' request.

———o———

## REASONS FOR DENYING PLAINTIFFS' PETITION

### The District Court For The Eastern District of Louisiana And The United States Court of Appeals For The Fifth Circuit Were Correct In Determining That Plaintiffs Were Not "Participants" Within The Intendment Of 29 USC 1002 (7) And 1132

As previously stated "participant" status under 29 USC 1002(7) is the central issue to the present controversy. Status as a participant is determinative of federal court subject matter jurisdiction and standing. *Kerbow v. Kerbow,* 421 F.Supp. 1253 (N.D. Tex. 1976); 29 USC 1132. In federal courts, as courts of limited jurisdiction, these determinations must be made before the court may proceed toward a trial on the merits.

This Court has previously recognized that the purpose of ERISA, 29 USC 1001, et seq., was to insure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by termination of the pension plan before sufficient funds could accumulate. *Pension Guaranty Corp. v. Gray & Co.,* 467 U.S. 104 (1984). In *Gray & Co., supra,* this Court was particularly concerned that any defined pension benefit promised to an employee be paid upon retirement.

This rationale had previously been applied by the lower federal courts in such decisions as *Pompano v. Schiavone & Sons, Inc.*, 680 F.2d 911 (9th Cir. 1982), in which the court stated that ERISA's purpose was to "secure guaranteed pension payments to participants by insuring the honest administration of a financially sound plan". *Id.* at 914.

The lower federal courts have also recognized the extremely onerous obligations and duties which ERISA imposes upon retirement plans towards participants. In *Nugent v. Jesuit High School of New Orleans*, 625 F.2d 1285 (5th Cir. 1980), the court pointed out that participant status must necessarily be limited in order to protect pension plans from the harrassment which could result from the extension of these obligations to persons who had no need of their protection. *Id.* at 1287.

In order to establish this necessary limitation, ERISA contains the following definition of "participant":

> "Any employee or former employee . . . who is or may become eligible to receive a benefit of any type from an employee benefit plan. . . ." 29 USC 1002(7).

While the question of subject matter jurisdiction under ERISA, particularly regarding participant status, has not been the subject of widespread litigation, decisions rendered thus far by the federal courts overwhelmingly support defendants' position.

One of the most frequently cited cases regarding participant status under ERISA is *Nugent v. Jesuit High*

*School of New Orleans,* 625 F.2d 1285 (5th Cir. 1980). In that case, the plaintiff was employed as a teacher for the Jesuit High School of New Orleans for three years. Since she was over 25 years old she was qualified as a participant in the school's pension plan while employed; however, she did not meet the minimum vesting period of five years employment under the plan. After termination, the plaintiff brought an action against the plan seeking disclosure of the total benefits accrued and the portion, if any, which had become vested. Additionally, she sought statutory penalties and attorney fees for the failure of the plan to provide the information as required by ERISA. The defendant plan sought and was granted a summary judgment on the ground that the plaintiff was not a participant and the court, therefore, lacked subject matter jurisdiction.

As in the present case, Nugent's claim to participant status was based upon the "may become eligible" language contained in 29 USC 1002(7). Nugent argued that there was always the possibility that she would be rehired at some later date and meet the vesting requirement prior to her retirement. The court analyzed this possibility, and in light of the purposes of ERISA determined Congress' intent was that the "may become eligible" language applied only to current non-vested employees.

In effect, the Fifth Circuit in *Nugent* described three classes of persons who qualified as "participants": (1) a current employee whose benefits had not yet vested since he would become eligible to receive a benefit in the future by acquiring enough tenure for vesting to occur, (2) a current employee whose benefits had already become vested, and (3) a former employee who was terminated after

having acquired vested benefits since at retirement the vested benefits would actually be paid. Clearly, persons who have retired and received the extent of their vested benefits such as plaintiffs do not fall into any of the categories of "participants" established by the Fifth Circuit in *Nugent.*

In *Yancey v. American Petrofina, Inc.,* 597 F.Supp. 498 (E.D. Tex., Beaumont Div. 1984), the court was presented with a case almost identical to the present situation. Plaintiff Yancey was an employee who had elected to retire early and accept a lump sum payment on March 1, 1982. Previously, on January 23, 1982 Mr. Yancey had been notified of a plan amendment which would have had the effect of substantially reducing lump sum benefits accepted after March 1, 1982.

After accepting his lump sum benefit, Mr. Yancey sued the plan contending that the trustees had breached their fiduciary duty, forcing him to retire early to avoid reduction of lump sum benefits and resulting in a net loss of income. While the court found the facts of the *Nugent* case to be dissimilar, it held that logic compelled the result that Mr. Yancey was not a "participant". Significantly, the court found the "may become eligible" language applied only to a former employee with a *non-forfeitable definite sum due him.* In finding that this rationale did not apply to the plaintiff, the court stated:

> "Neither can this court regard Yancey as a former employee who has yet to receive benefits. When Yancey retired on March 1, 1982, he received in a lump sum form all of the vested benefits that were due him under the plan." *Id.* at 493.

Similarly, in the present case plaintiffs received their entire lump sum benefit to which they were entitled under the Plan as it existed at the time of their retirement. At the time this suit was initiated, plaintiffs had no "non-forfeitable definite sum" due them.

In *Freeman v. Jacques Orthopedic & Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654 (9th Cir. 1983), the Ninth Circuit Court of Appeal had the opportunity to analyze at length the basis for participant status. In that case, the plaintiff had validly waived any right to participate in the plan but sued contending that he had been misled by the trustees as to the cost of participation; therefore, the waiver was invalid. The court ultimately found it lacked subject matter jurisdiction as Mr. Freeman was not a "participant".

The basis for the court's decision was that no contributions had ever been made to the plan by or on behalf of Mr. Freeman; therefore, the protection of ERISA in granting a "participant" a federal forum to protect his interest in the pension fund was totally unnecessary. Clearly, the present plaintiffs are not dissimilar to Mr. Freeman. At the time of defendants' action, and indeed at the present time, they are not participants as no contributions remain in the Plan on their behalf. By plaintiffs' own actions, all contributions were voluntarily removed from the Plan.

In addition to the jurisprudence, it is clear that the Department of Labor would not regard the present plaintiffs as "participants". The Code at 29 C.F.R. 2610.2 provides that the definition of "participant" does not include, " . . . an individual to whom an insurance company

has made an irrevocable committment to pay all the benefits to which the individual is entitled under the plan . . . . " (Appendix C). Once the former employee has received an irrevocable committment from a third party insurance company to pay his monthly benefits, he no longer has a financial interest in the administration of the plan. If, as in the present case, the former employee has actually received all of his benefits in a lump sum, he has even less reason to complain.

When the plan turns the former employee's benefits over to an insurance company who purchases an annuity to produce monthly benefits, the Department of Labor no longer considers the employee a "participant". Similarly, where the benefits are turned over to the employee himself, who may then invest those benefits in any manner in which he sees fit, he would no longer be regarded as a participant. As this Court has previously recognized, substantial deference must be given to the construction of a statute by the agency charged with enforcing it. *United States v. Rutherford,* 442 U.S. 544 (1979).

Plaintiffs' sole claim to participant status is the bootstrap argument that they may become eligible to receive a benefit if a court ultimately finds in their favor. This was the identical position adopted by the plaintiff in *Freeman, supra;* however, the court had no trouble in dismissing this argument.

The Ninth Circuit correctly distinguished "benefits" from damages which the plaintiffs might recover. Under ERISA, "benefits" are the returns payable to a participant from the administration of his contributions by the plan. 29 USC 1002(22) and (23), (Appendix D). The court held that where the plan administered no contribu-

tions on behalf of the plaintiff, any recovery awarded to him must necessarily be an award of damages, not "benefits".

The court succinctly explained that an award of damages could not have the effect of making the plainitff a participant, stating:

> "This court cannot rewrite history and declare that he [plaintiff] did participate. At most, this court, or any court for that matter, could award Freeman the damages caused by the alleged fraud. This is different from awarding him a 'benefit under a plan'. If it were not, then any plaintiff who could argue a colorable claim would be a participant, since a victorious lawsuit would award him a 'benefit'." *Freeman, supra* at 721.

Throughout the course of this litigation it has been undisputed that all plaintiffs retired and elected to receive their lump sum benefit in lieu of continuing monthly benefits prior to the effective date of the Plan amendments, January 1, 1981. Therefore, no contributions made by or on behalf of the plaintiffs remained in the Pension Fund at the time the Plan was amended, or on the retroactive effective date of the amendments.

An examination of the applicants' petition reveals the basis of their complaints to be that certain lump retirees, those retiring between Janaury 1, 1981 and July 29, 1981, were accorded a gratuity which was not given to plaintiffs. While defendants believe that they had sufficient reasons to act in the manner in which they did, it is clear that plaintiffs have no standing to complain of defendants' actions.

In analyzing this matter with regard to congressional intent, application jurisprudence and Department of Labor

interpretations, it is clear that plaintiffs do not qualify as participants; therefore, there is no federal court subject matter jurisdiction provided under ERISA. At the time of the Plan amendments and the present lawsuit, defendant pension plan administered no contributions on behalf of the plaintiffs and, therefore, they do not fall within a class of persons who Congress intended to protect in adopting ERISA.

Further, the plaintiffs fail to qualify as participants under any of the tests established by the jurisprudence. They do not fall within any of the classes of participants as defined in *Nugent, supra,* nor can they show that they are entitled to a non-forfeitable definite sum from the Plan as required by *Yancey, supra.* Finally, analyzing the matter under the *Freeman* decision, it is clear that the plaintiffs, if successful, would not become eligible to receive a benefit but simply an award of damages from defendants. This is insufficient to establish participant status and subject matter jurisdiction under ERISA.

Undeniably, the overwhelming weight of authority supports the action of both lower courts in dismissing the present matter.

**There Exists No Divergence Of Authority Among The Circuit Courts Of Appeal And District Courts Requiring This Court's Attention**

The plaintiffs' attempt to establish a need for this Court's attention primarily by pointing out decisions of the United States Court of Appeal for the Ninth Circuit. They contend that these decisions can not be harmonized with the cases from the Fifth Circuit or even with each other. Actually, the cases are easily explicable in light of the underlying purpose of ERISA.

Plaintiffs first refer to the decision of *Bricklayers' Health & Welfare Trust Fund of the Inland Empire, San Bernadino & Riverside Counties v. Brick Masons' Health & Welfare Trust Fund,* 656 F.2d 1397 (9th Cir. 1981). In the *Bricklayers* case, the plaintiffs were former members of defendant plan. They decided that their interests would be better served by having their own pension plan and withdrew from the defendants' plan. The basis of the suit was plaintiffs' claim against their former plan to receive their contributions and accumulated benefits to reinvest into the new pension plan.

While the court did refer to the plaintiffs as "former participants", it is clear from analyzing the decision that the actual relevant status of the plaintiffs would have been "former members", category (3) under the *Nugent* analysis. The court made no determination as to their status as "participants". In fact, the nature of the suit illustrates that plaintiffs were still "participants under the ERISA definition since they were suing for contributions made by them or on their behalf that had been retained by the first plan.

Another case, *Freeman v. Jacques Orthopedic Joint Implant Surgery Medical Group, Inc., supra,* is relied upon by plaintiffs as establishing a split of authority among the cases from the Ninth Circuit. As previously pointed out, the *Freeman* decision undeniably supports defendants' present position. The key to the court's decision in denying subject matter jurisdiction was the fact that no contributions made by or on behalf of the plaintiff were retained in the fund at the time of the plaintiff's suit. Although the plaintiff had a complaint regarding the conduct of the trustees, federal court jurisdiction under ERISA

was not necessary as the plan administered no contributions on behalf of the plaintiff.

Considering the Congressional purpose in establishing ERISA, the results in both the *Freeman* and the *Bricklayers* decisions are exactly as expected.

The plaintiffs next rely on another Ninth Circuit decision, *Weiss v. Sheetmetal Workers Local No. 554 Pension Trust,* 719 F.2d 302 (9th Cir. 1983), as establishing a split between the United States Courts of Appeal for the Ninth Circuit and the Fifth Circuit. Contrary to plaintiffs' statements in their writ application, the Ninth Circuit did not specifically reject the *Nugent* analysis in the *Weiss* decision.

In *Weiss* the plaintiff did not claim entitlement to a pension, nor did he even make a showing that he had met the minimum vesting requirements under ERISA. The court specifically found that the plaintiff had failed to make even a prima facie showing that he qualified as a "participant". The court was cognizant of the *Nugent* decision but specifically found that due to the plaintiff's lack of any showing of an entitlement to participant status it was not necessary for the court to go as far as the Fifth Circuit in *Nugent.* Clearly this does not establish a specific rejection of the *Nugent* analysis by the Ninth Circuit. The result reached was again totally consistent with that analysis and the Congressional purpose in establishing ERISA.

Plaintiffs' reference to the case of *Chase v. Trustees of the Western Conference of Teamsters Pension Trust Fund,* 752 F.2d 744 (9th Cir. 1985), utterly fails to establish any indecision within the Ninth Circuit concerning

participant status. In fact, the only question presented with regard to participant status was whether the plaintiffs were employees or independent contractors. The court simply determined that a remand for additional evidence was necessary.

Plaintiffs also attempt to establish an inconsistency within the Fifth Circuit by pointing out the decision of *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357 (5th Cir. 1981). In *Paris*, plaintiffs were employees who had been terminated between the dates on which the plan was adopted, February 21, 1974, and the date on which it was retroactively instituted, June 1, 1973. Additionally, because of the dates which were involved the court was faced with significant problems involving the effective date of ERISA itself. The court found that this unique situation created substantial uncertainty over whether the plaintiffs were "participants". However, despite this confusion, the court ultimately determined that the plaintiffs had no claim since the plan administered no contributions for them.

In any event, the present matter is materially dissimilar from that presented in *Paris*. In the present case, the plaintiffs all retired *prior* to the retroactive effective date of the Plan amendments. Not one of the forty-nine plaintiffs claims that he was an employee in the interim period between the retroactive effective date, January 1, 1981, and the date on which the Plan was amended, July 29, 1981.

The district court opinions cited by the plaintiffs do not indicate that the lower federal courts are having any difficulty understanding the basis for participant status and applying the rationale of the circuit courts of appeal.

As previously stated, the court in *Yancey, supra,* concluded that a lump sum retiree lacked participant status. This is easily understood since the Plan no longer maintains or administers any contributions made by or on behalf of that employee.

The factual situation presented to the court in *Stewart v. National Shopmen Pension Fund,* 563 F.Supp. 773 (D.C. 1983), presented no real issue of participant status; however, the court's analysis indicated that it was completely familiar and able to apply the Congressional intent. The court was able to make a subtle distinction between "employees" and "participants" under ERISA indicating that it was having no difficulty interpreting the various decisions from the courts of appeal.

Even looking at the one sentence regarding *Folz v. Marriott Corp.,* 594 F.Supp. 1007 (W.D. Mo. 1984) included within the plaintiffs' brief, "former employee who was a participant at the time of his termination had standing under ERISA 'to recover benefits due him . . ., to enforce his rights . . ., or to clarify his rights to future benefits . . . '", establishes its consistency with other decisions. Obviously, none of the previous decisions have denied that a former employee for whom the fund retains contributions would have standing to utilize the rights accorded to "participants" under ERISA.

This review of the jurisprudence is sufficient to illustrate that the lower federal courts are not having difficulty in determining Congressional intent in situations similar to the present matter and in applying that intent in a consistent and well-reasoned manner.

The decisions of the Ninth Circuit regarding participant status under ERISA are not only internally consistent but also are consistent with and support the rationale expressed by the Fifth Circuit in the *Nugent* decision.

Defendants contend, therefore, that there is no present necessity for the Court to further review this matter.

**The Plaintiffs Have Waived Any Right Which They May Have Had To Compel Defendants To Arbitrate The Present Matter By Actively Engaging In The Present Litigation**

The plaintiffs have for the first time throughout the course of this litigation requested that this Court compel the defendants to submit to arbitration. Plaintiffs chose to bring this action in the Federal District Court requesting the court rule on the merits of their claim.

It is well established that the right to compel arbitration may be waived by actively engaging in litigation. *Commercial Union and Metal Co. v. Bache Halsey Stewart, Inc.*, 581 F.2d 246 (10th Cir. 1978); *N & D Fashions, Inc. v. DHJ Industries, Inc.*, 548 F.2d 722 (8th Cir. 1976); *E. C. Ernst, Inc. v. City of Tallahassee*, 527 F.Supp. 1141 (N.D. Fla., Tallahassee Div. 1981); *Lubrizol International SA v. M/V Stolt Argobay*, 562 F.Supp. 565 (S.D. N.Y. 1982); *Weiland v. Pyramid Ventures Group*, 511 F.Supp. 1034 (M.D. La. 1981). Clearly, the plaintiffs' action in seeking out a federal forum and requesting that the court rule on the merits of their claim waived any right to compel defendants to arbitrate.

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## CONCLUSION

Respondents submit that Congressional intent, the jurisprudence, and the Department of Labor interpretations are consistent and require a finding that plaintiffs are not "participants" within the intendment of 29 USC 1002(7) and 1132. Therefore, the actions of both the Federal District Court for the Eastern District of Louisiana and the Court of Appeal for the Fifth Circuit are undeniably correct since the plaintiffs lack standing to bring the present suit and the courts themselves lack subject matter jurisdiction.

Additionally, plaintiffs' own actions in filing a complaint in the District Court seeking relief on the merits and failing to request that defendants be compelled to arbitrate has effected a waiver of any right which the plaintiffs may have had to compel such arbitration.

Therefore, this Court should deny plaintiffs' petition for a writ of certiorari.

Dated the 31 day of October, 1985.

Respectfully submitted,

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## APPENDIX "A"

"(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit."

## APPENDIX "B"

"A civil action may be brought

(1) by a participant or beneficiary

(a) for the relief provided for in subsection (c) of this section, or

(b) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this sub-chapter or the terms of this plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) Except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section."

## APPENDIX "C"

"(a)(2) Any non-vested individual who is not currently in employment covered by the plan but who is earning or retaining credited service under the plan. This category does not include a non-vested former employee who has incurred a break in service the greater of one year or the break in service period specified in the plan.

(b) Inactive

(b) (1) inactive receiving benefits

Any individual who is retired or separated from employment covered by the plan and who is receiving benefits under the plan. This category does not include an individual to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan.

(b) (2) Inactive entitled to future benefits

Any individual who is retired or separated from employment covered by the plan and who is entitled to begin receiving benefits under the plan in the future. This category does not include an individual to whom an insurance company has made an irrevocable commitment to pay all the benefits to which the individual is entitled under the plan.

(c) Deceased

Any deceased individual who has one or more beneficiaries who are receiving or entitled to receive benefits under the plan. This category does not include an individual if an insurance company has made an irrevocable commitment to pay all the benefits to

which the beneficiaries of that individual are entitled under the plan.

Provided that, for plan years beginning before September 2, 1975, a retiree or former employee for whom a fully paid-up immediate or deferred annuity has been purchased shall be treated as a 'participant' if such individual retains a legal claim against the plan for benefits or if the plan retains a participating interest in the annuity policy.

'PBGC' means the Pension Benefit Guaranty Corporation.

'Plan Year' means the calendar, policy or fiscal year on which the records of the plan are kept.''

''(22) The term 'normal retirement benefit' means the greater of the early retirement benefit under the plan, or the benefit under the plan commencing at normal retirement age. The normal retirement benefit shall be determined without regard to

(A) medical benefits, and

(B) disability benefits not in excess of the qualified disability benefit.

For purposes of this paragraph, a qualified disability benefit is a disability benefit provided by a plan which does not exceed the benefit which would be provided for the participant if he separated from the service at normal retirement age. For purposes of this paragraph, the early retirement benefit under a plan shall be determined without regard to any benefit under the plan which the Secretary of the Treasury finds to be a benefit described in section 1054(b)(1)(G) of this title.

(23) The term 'accrued benefit' means

(A) In the case of a defined benefit plan, the individual's accrued benefit determined under the plan and, except as provided in section 1054(c)(3) of this title, expressed in the form of an annual benefit commencing at normal retirement age, or

(B) in the case of a plan which is an individual account plan, the balance of the individual's account.''

Supreme Court, U.S.
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CLERK

No. 85-490

In The
# Supreme Court of the United States
October Term, 1985

MELBOURNE E. JOSEPH, SR., ET AL,
*Petitioners,*

v.

NEW ORLEANS ELECTRICAL PENSION AND RETIREMENT PLAN, ET AL,
*Respondents.*

## REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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## QUESTIONS PRESENTED

I.

Did the United States Court of Appeals for the Fifth Circuit err in finding that individuals who accept a lump-sum retirement from an ERISA covered Pension Plan lack standing to assert ERISA violations affecting their pension benefits and reflecting a breach of duty committed by the Trustees?

II.

Did the United States Court of Appeals for the Fifth Circuit err in not compelling the Trustees of an ERISA covered Pension Plan to submit to arbitration when the trust regulations provided for arbitration in a pension dispute and when the Trustees of the Pension Plan affirmatively agreed to arbitrate?

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## REPLY TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

In their Petition for Writ of Certiorari, the Petitioners state two grounds for review by this Court. The Respondents presented three questions but these questions are substantially the same as the two presented by the Petitioners.

The Petitioners consider the Respondents' arguments to support the Petitioners' allegations that there is conflict among the circuits and that the question is one of significance that has not been but should be decided by

this Court. The Petitioners do not intend to reargue their Petition. The Petitioners must, however, address the third question presented by the Respondents since the Respondents argument may mislead this Honorable Court.

In the Respondents' Question Presented, Number 3, they asked the following:

> Have plaintiffs waived their right to request that defendants be compelled to submit to arbitration by invoking the jurisdiction of the federal court requesting relief on the merits, and failing to request that defendants be compelled to arbitrate in any of the previous proceedings?

The Respondents cite two Circuit Court of Appeals cases and three District Court cases which they argue support their claim that the "plaintiff's action in seeking out a federal forum and requesting that the court [sic] rule on the merits of their claim waive any right to compel the defendants to arbitrate." Respondents' Brief In Opposition To Petition for Writ of Certiorari, at 16.

To correct the Respondents' misstatement, the Petitioners offer the following from their complaint:

> Complainants aver that the Plan and its Trustees have violated the provisions of the Pension Trust Document and the Employee Retirement Income Security Act by failing to comply with the provisions of the Appeals Procedure in cases of this type . . . .
>
> . . . .
>
> Complainants aver that the Plan and its Trustees have wholly, callously, and wantoning failed to comply with the provisions of the Trust Document and Appeals Procedure and have not filed a reaffirmation of their prior decision to arbitrate said dispute and claim, nor have they chosen to implement the Ar-

> bitration Procedure as provided for in the Trust Document . . . .
>
> . . . .
>
> WHEREFORE, PREMISES CONSIDERED, Complainants sue, demand, and pray for judgment of and from the Defendants for the sum of . . . $310,000.00 to be awarded to each of the complainants . . . . *Further, your Complainants pray that this Honorable Court will order and direct that the Defendants, in the alternative, implement the Grievant/Arbitration Procedure* . . . .

(Emphasis Added.) Clearly, the Petitioners prayed, alternatively, for an order compelling arbitration. See, F.R. Civ.P. 8.

The Plan Benefits Handbook which is attached to the Complaint as part of Exhibit IV, is addressed "TO ALL PARTICIPANTS." After the trial court granted the Respondents' Motion to Dismiss, the following dialogue occurred:

> Ms. Buttross: And without or with leave to amend?
>
> The Court: Well, it's gone. [A]nd what I hope you'll do, is appeal . . . .

Transcript of Motion to Dismiss, February 1, 1984, at 24. Clearly the trial court considered all claims to lie with the "participant question." In any case, it is quite ironic, in light of Appendix G of the Petition for Writ of Certiorari, that the Respondents would claim that the Petitioners have waived arbitration when it was Respondents' ultimate refusal to arbitrate that prompted litigation.

Finally, the Petitioners quote from one of the cases cited by the Respondents in their Brief In Opposition:

> Although it is well settled that a party may, through his own conduct, waive his right to arbitration . . . whether waiver has occured or not cannot be determined by an inflexible rule and depends on all of the circumstances of the particular case. . . . However, federal policy favors arbitration, and waiver is not to be lightly inferred.

*Lubrizol International v. M/V Stolt Argobay*, 562 F. Supp. 565, 572 (S. D. NY 1982).

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## CONCLUSION

The Petitioners again respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit. Alternatively, the Petitioners pray that this Court will summarily reverse the decision of the United States Court of Appeals for the Fifth Circuit and will remand this case to the United States District Court for the Eastern District of Louisiana.

Respectfully submitted,

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